SUPREME COURT, U. S.

AUG 11 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1969

No. 460

ELMER SAMUEL CHAPMAN
AND
JAMES TERRELL KNIGHT

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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Counsel for Petitioners

IN THE

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V.

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Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For the Fifth Circuit

Petitioners, Elmer Samuel Chapman and James Terrell Knight, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 30th of June, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 30th of June, 1969. An extension was grant-

ed by this Court until August 9, 1969, to file this petition. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Is a warrantless arrest for the misdemeanor offense of possessing property intended for use in violating the Internal Revenue laws relating to illicit whiskey valid when the property so possessed is not contraband per se nor its mere possession prohibited by law.

STATEMENT OF CASE

Petitioners were convicted for possessing sugar intended for use in the illicit liquor business. There was no arrest or search warrant and their motion to suppress was denied. For purposes of this petition it is conceded the evidence showed they were observed in the afternoon loading at two small retail stores a large quantity of sugar on a truck and thereafter, they parted company and one of them drove the truck some 15 miles on public roads to Ft. Valley, Georgia where he was arrested on the outskirts of town. Each was known to the officers as having reputations for handling "raw materials" insofar as illicit liquor was concerned.

REASON FOR GRANTING THE WRIT

Petitioners here seek and ask this Court to limit the rationale and holding of those cases such as *Carroll v. United States*, 267 U.S. 132, 45 SCT. 280 (1925) which permit a warrantless arrest upon probable cause to those instances wherein the offending property is contraband per se and not such a type property as is readily available upon the open market.

The property here involved was plain, household Dixie Crystal sugar. For the crime to be complete insofar as its possession for unlawful purposes is concerned, the requisite criminal intent to use it in violation of the Internal Revenue Laws relating to

illicit liquor must be present beyond a reasonable doubt, otherwise, the crime is not complete and therefore, not committed in the presence of the arresting officer. An arrest warrant was therefore necessary.

As we read *Carroll*, it was decided during the prohibition era when liquor per se was unlawful and the crucial need was to prohibit generally its manufacture, possession, etc. Therefore, when the above reasoning as to drawing a distinction between arrest for felonies and those for misdemeanors to the extent of requiring the arresting officer to "sense" a violation in his presence, Mr. Justice Taft did "not think such a nice distinction is applicable in the present case." Under the law there involved, the primary concern was the seizure and forfeiture of the contraband liquor and it was the property and not so much the owner thereof that offended. Here, sugar per se is not so offensive such as its possession is prohibited as a matter of law per se. Therefore, the arresting officer, under the theory of *Carroll*, is substituted as the trier of facts on the scene. Were it contraband involved, the case would be different and petitioners so concede.

The same is true under the holding of *Brinegar v. United States*, 338 U.S. 160, 69 SCT. 1302 (1949) which concerned the misdemeanor statute of transporting liquor into a prohibited area. So it is not every misdemeanor that should come without the reach of *Carroll* and *Brinegar*, but only those in which the property alleged to be the offender is not in and of itself contraband. Sugar is only forfeitable when possessed with the requisite intent. Standing alone, it is not. Therein lies its difference from those items of contraband such as untax paid spirits, goods on which custom duties have not been paid, fruits of a crime, stolen property, etc.

We respectfully differ therefore from the learned court below and submit their reliance on the cases cited is misplaced when one examines closely the offending properties therein involved.

If in fact such would render law enforcement difficult in the so-called raw materials area as to the Internal Revenue Laws relating to liquor, such is no more than justice requires under the circumstances. We do not say that no arrests for such can be made but only arrests with a valid warrant and are seeking only to confine that to instances when the property involved is not contraband as such. If the property is the thing sought, then there is ample statutory authority for the offending property to be seized under a proper monition and attachment and a libel of information filed to condemn such. Petitioners here simply urge the invalidity of their arrests and attack the manner of seizure herein as not being lawfully incident to a valid arrest.

Petitioners concede probable cause as being a valid basis in other instances for an arrest and seizure and agree with the various statements as to what that term means. In this case, however, in view of the statutory distinction between the agent's power of arrest for a felony and his power of arrest for a misdemeanor, the distinction must be given meaning. See 26 USCA 7608 quoted in the opinion found in the appendix hereto.

Therefore, was this crime committed in the arresting officer's presence? As stated, it is unlike those cases where the offending property is contraband per se and reasonably believed to be in the possession of the accused. Here it was wide open daylight, literally on the edge of a city on a public street and no where near that remote part of the country "infested by smugglers" as Mr. Justice Taft quoted in *Carroll* when he noted the geographical layout of the operations there dealt with. Had the driver here been proceeding down a wooded road in a sparsely populated area towards a known creek or river with 6,480 pounds of sugar, the case might well have been different. But suspicion only existed at the time of arrest. That is not enough as this Court has held.

We respectfully submit this Court should restrict warrantless arrests insofar as misdemeanors are concerned to those cases involving property that is contraband per se. Otherwise a warrant should be required. Such is not only for the protection of the innocent but indeed, for those who in fact in the past may have been or have been suspect. At any given moment, they must have the same constitutional safeguards.

CONCLUSION

The proper administration of criminal justice and equal protection to the innocent as well as the suspect alike require that a valid arrest warrant be issued by a magistrate when one is suspected of unlawfully possessing property intending to use same in violation of law when such property is in of itself not contraband or prohibited per se.

Respectfully submitted,
Joseph H. Davis
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition upon the United States Attorney, Middle District of Georgia, Macon Division, Macon, Georgia, Counsel of Record for adverse party, by mailing same to him at his post office address, United States Courthouse, Macon, Ga., and also by airmail upon the Solicitor General, Department of Justice, Washington, D. C. 20530, with first class postage prepaid in each instance.

This 9th day of August, 1969.

Joseph H. Davis

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 26992 and 27002

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

ELMER SAMUEL CHAPMAN

Defendant-Appellant

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

JAMES TERRELL KNIGHT

Defendant-Appellant

Appeals from the United States District Court for the Middle District of Georgia

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(June 30, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: Appellants were convicted by a jury of aiding and abetting each other in possessing certain property (6,480 pounds of sugar and a Dodge truck), knowing it was intended to be used in the nontax-paid distilled spirits business, a misdemeanor under 26 U.S.C. § 5686(a).[1] Both appellants filed motions to suppress evidence pertinent to the seizure of the property by the Federal Revenue Agent who, without a warrant, stopped the truck which appellant Chapman was driving, arrested Chapman, and seized the truck and its load of sugar. These motions were denied.[2]

Appellants attack their convictions on three grounds: (1) insufficiency of the evidence; (2) illegality of the arrest and subsequent search and seizure and consequent failure of the court to suppress the evidence; and (3) introduction of evidence by the Government, over objection, of the purchase by appellant Knight of large amounts sugar.

The following facts led to the arrest, seizure and subsequent convictions.

On June 20, 1968, Federal Revenue Agents Brown and Rogers were observing Highway 41 Grocery in the vicinity of Perry,

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[1] 26 U.S.C. § 5686(a):

> "It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both."

[2] Pursuant to new Rule 18 of the Rule of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5 Cir., 1969, _____ F. 2d _____, Part I [No. 26902, slip opinion dated March 11, 1969].

See the opinion rendered this day in the related matter of United States of America v. James Terrell Knight, 5 Cir., 1969, _____ F. 2d _____ [No. 27001] affirming the revocation of probation of appellant Knight.

Georgia. At about 2 p.m., both agents saw appellants Knight and Chapman drive up to the grocery in separate vehicles—Knight, in a Buick automobile, and Chapman, in an empty Dodge truck. The agents knew both appellants by reputation as being connected with the illicit liquor business. They saw both appellants go into the grocery and after a few minutes come out. Appellants then began loading the truck with sugar.[3] Appellants left in the same two vehicles and proceeded to Moses Grocery approximately 300 yards away where they loaded more sugar onto the truck, after which they left in convoy fashion, with Agent Brown following closely behind. When the two suspects separated at an intersection Brown continued to follow Chapman, the driver of the truck, as far as the vicinity of Fort Valley, Georgia, a distance of about 16 miles, when Brown stopped him and placed him under arrest.

The arresting officer, Brown, could clearly see the sugar through a crack in the back of the truck from the time of the loading to the time of arrest. He had known both appellants by sight for approximately three years. He had previously arrested Chapman for the same violation. He knew that both men had previously violated the Federal Internal Revenue Laws, and that Knight had the reputation of being a "raw materials diverter on a big scale."[4] He also knew that Knight managed a small retail store which was registered in his mother's name. However, he observed that sugar-laden truck was headed in the direction opposite to this store, thus dispelling

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[3]Although Agent Rogers' position did not allow him to see the actual sugar being loaded, he observed later that the previously empty truck was heavily laden, and still later at the Sheriff's Office he counted 6,480 pounds of sugar in the back of the same truck. Agent Brown's vantage point enabled him to see clearly the sugar being placed into the truck.

[4]Both appellants have been before this court in related matters. See Knight v. United States, 1962, 310 F. 2d 305; Knight v. United States, 1962, 297 F. 2d 675; Chapman v. United States; 196, 289 F. 2d 539; Chapman v. United States, 1959, 272 F. 2d 70, rehearing denied, 1960, 273 F. 2d 412.

any possible doubt that the sugar was intended for resale at Knight's retail store. Brown also knew that the "moonshine whiskey" traffic flourished in that general vicinity of the state.

In addition to the testimony of the two Revenue Agents, including Brown's eyewitness account of the actual sugar loading, the evidence also showed that Knight had recently purchased large amounts of sugar: approximately 311,720 pounds during 1967 and 46,110 pounds for the first six months of 1968. During the latter part of 1967 the Federal Government made demand on grocers in connection with sales of sugar, requiring them to report quantities sold in amounts over 100 pounds. There was no plausible reason why appellants should procure, and then themselves load, sugar from two stores in Perry and haul it 16 miles to Fort Valley. Of course, the purpose for taking the sugar to Fort Valley and not in the opposite direction to Knight's store was without reasonable explanation.

Appellants argue that before an arrest without a warrant can be made for a misdemeanor, as distinguished from a felony, the offense must be committed in the presence of the arresting officer. They contend that the offense consists of two elements—possession and intent to use the material in the illicit liquor business. Further, they argue, it was impossible to ascertain under the circumstances the illicit intent from the mere possession of the sugar, a commodity not per se illegal and, therefore, the arrest was invalid.

The statute authorizing the arrest, 26 U.S.C. § 7608, reads in pertinent part:

> "(a) Any investigator, agent, or other internal revenue officer . . . may—
>
> . . . .
>
> (3) . . . make arrests without warrant for any offense against the United States committed in his presence, or

> for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony. . . . "

Undoubtedly, the statute sets out different criteria for misdemeanor arrests as compared with felony arrests. It requires that the misdemeanor be committed in the presence of the arresting officer for a warrantless arrest therefor to be valid.[5] It is also necessary that both possession and illicit intent be present in order to constitute a violation under 26 U.S.C. § 5686(a).[6] We have no hesitancy, however, in concluding from the record that the crime was in fact committed in the presence of Agent Brown. Possession was proved by his eyewitness testimony and corroborated by Agent Rogers. There was also substantial evidence to prove the element of illicit intent.

Whether or not a warrantless arrest is lawful depends upon whether the arresting officer had probable cause to believe that an offense was being committed in his presence. In *Brinegar v. United States*, 338 U. S. 160, 174, 175, 69 S. Ct. 1302, 1310 (1949), a case involving a conviction for a misdemeanor under the Liquor Enforcement Act, 18 U.S.C. § 1262, the Supreme Court, in discussing the standards for determining probable cause for arrest, as well as for search and seizure, said:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not

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[5] "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdeameanor if committed in his presence. Kurtz v. Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 S. Ct. 729, 44 L. Ed. 874." Carroll v. United States, 267 U. S. 132, 156, 157, 45 S. Ct. 280, 286 (1925).

[6] Adams v .United States, 10 Cir., 1967, 375 F. 2d 635, 638; United States v. Skinner, 2 Cir., 1959, 272 F. 2d 607 608.

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

" . . . Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the believe that' an offense has been or is being committed."

See also *Henderson v. United States*, 5 Cir., 1968, 405 F. 2d 874, 875, cert. denied, ____ U. S. ____ (1969); *Ward v. United States of America*, 5 Cir., 1961, 288 F. 2d 620, 621.

In *Beck v. State of Ohio*, 379 U. S. 89, 96, 85 S. Ct. 223, 228 (1964), the Supreme Court, citing the landmark decision of *Carroll v. United States*, supra, which involved a misdemeanor, said, "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed. *Carroll v. United States*, 267 U. S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543."

Having found that the arrest was lawful, it follows that the seizure of the sugar and truck as an incident to that arrest was lawful as well as the admission of evidence pertinent thereto. *Beck v. State of Ohio*, 379 U. S. 89, 91, 85 S. Ct. 223, 225 (1964); *United States v. Rabinowitz*, 339 U. S. 56, 65, 70 S. Ct. 430, 435 (1950). The reasonable cause which the seizing officer had for believing that the contents of the vehicle offended against the law was an independent ground for seizure, *Carroll v. United States*, 267 U. S. at 158, 159, 45 S. Ct. at 287, and there was abundant evidence that Agent Brown, from his past experience with appellants and from the actual witnessing of

the loading of the truck, had reasonable cause under the circumstances.

There was substantial evidence to justify the denial by the court of the motion to suppress and to support the verdict. Consequently, taking the view most favorable to the Government, we may not upset the verdict.[7]

If we were to follow appellants' theory to its logical conclusion, there could never be a warrantless arrest for the possession of materials intended for use in violation of the Internal Revenue Laws, inasmuch as "intent," being a subjective quality, could never be observed by the senses.[8]

The construction which appellants urge would also render inoperative the Internal Revenue Laws pertinent to seizure and forfeiture of the prohibited raw materials and the conveyances for the transportation of same.[9]

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[7]Glasser v. United States 315 U. S. 60, 80, 62 S. Ct. 457, 469 (1942); Lacaze v. United States, 5 Cir., 1968, 391 F. 2d 516, 519; Gorman v. United States, 5 Cir., 1963, 328 F. 2d 51, 52; Walker v. United States, 5 Cir., 1962, 301 F. 2d 94, 95; Ah Ming Cheng v. United States 5 Cir., 1962, 300 F. 2d 202, 203.

[8]A similar argument was urged and rejected in Carroll v. United States, 267 U. S. 132, 157, 45 S. Ct. 280, 286, 287 (1925).

[9]26 U.S.C. § 7321 provides that

> "Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate."

26 U.S.C. § 7301 provides in pertinent part as follows:

> "(b). All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax may also be seized, and shall be forfeited to the United States.
>
> "(e). Any property . . . used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property which is intended to be used in the making or packaging of property described in subsection (a), may also be seized, and shall be forfeited to the United States."

We say again, as this court said in *Chapman v. United States*, 5 Cir., 1961, 289 F. 2d 539, 542, a case involving one of the same appellants for the identical violation:

> "[T]he information which the officers had justified their belief that the sugar was intended for use in violating the provisions of the internal revenue laws. The arrest and seizure were legal, and the motion to suppress was properly overruled."

Appellants contention that the court erred in admitting evidence pertinent to the former purchases of large amounts of sugar by defendant Knight is without merit. In *Gilstrap v. United States*, 5 Cir., 1968, 389 F. 2d 6, 9, in recognizing an exception to the general rules of exclusion, we said:

> "[W]here intent and knowledge are essential elements of the crime for which the defendant is being tried, evidence of other transactions, even though criminal in nature, is admissible to prove the necessary criminal intent or guilty knowledge, if the transactions are so connected with the offense charged that they serve to show a general pattern."[10]

The evidence was admissible for the purposes of proving a consistent and recurrent pattern of conduct relevant to the issue of intent.

AFFIRMED.

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[10]Nye & Nissen v. United States, 336 U. S. 613, 618, 69 S. Ct. 766, 769 (1949). See also Barnett v. United States, 5 Cir., 1967, 384 F. 2d 848, 862; Brumley v. United States, 5 Cir., 1967, 379 F. 2d 327; Pardo v. United States, 5 Cir., 1966, 369 F. 2d 922 924, 925; 2 Wigmore, *Evidence* §§ 302-304 (3d ed. 1940); 32 C.J.S. *Evidence* §§ 579-580.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26992

D. C. Docket No. CR. 8629

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELMER SAMUEL CHAPMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 30, 1969

Issued as Mandate:

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27002

D. C. Docket No. CR. 8629

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JAMES TERRELL KNIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

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June 30, 1969

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